

STATE OF MICHIGAN  
COURT OF APPEALS

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BARBARA J. WAMSLEY,

Plaintiff-Appellant,

V

CHEBOYGAN COUNTY ROAD  
COMMISSION,

Defendant-Appellee.

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UNPUBLISHED

July 16, 2013

No. 309802

Cheboygan Circuit Court

LC No. 10-008084-CH

Before: SAWYER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders granting summary disposition in favor of defendant in this quiet title action. Because plaintiff did not acquire title to the unpaved portion of the road, including the riparian property, at issue under the theories of acquiescence, adverse possession, or abandonment, we affirm in part. But, because the trial court did not address whether plaintiff had riparian rights pursuant to our Supreme Court's decision in *2000 Baum Family Trust v Babel*, 488 Mich 136, 143; 793 NW2d 633 (2010), or plaintiff's claim that she holds fee title to the alley adjacent to her home because defendant never accepted the dedication of the alley, we remand to the trial court for the court to address those limited issues. We therefore affirm in part and remand for further proceedings.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case arises out of a dispute involving real property. Plaintiff owns lot 5 of block 3 in the Village of Indian River, located in Tuscarora Township, Cheboygan County. Plaintiff's lot faces Prospect Street, which runs parallel to Indian River in front of plaintiff's lot. Prospect Street is a paved roadway with gravel or dirt shoulders on either side of the pavement and is located between plaintiff's lot and the shore of Indian River. South of Prospect Street are cement steps that lead down to the edge of Indian River to a wooden dock that plaintiff and her predecessors in title have maintained. Adjacent to plaintiff's home located on the southwestern corner of her lot is an alley approximately 16-½ feet wide that ends at Prospect Street.

The instant dispute arose after plaintiff obtained a permit from the United States Corp of Engineers to make improvements to the shoreline, including replacing the dock. While Michael Bachand was replacing the dock on plaintiff's behalf, an employee from defendant Cheboygan County Road Commission approached him and informed him that a permit was required to

replace the dock. Plaintiff applied for a permit, but defendant denied her application, stating that it “does not issue permits for private facilities within public rights-of-way.”

Thereafter, plaintiff filed a complaint to quiet title to the riparian property between Prospect Street and Indian River, to the unpaved portion of Prospect Street in front of her home, to the alley adjacent to her home, and to the unpaved portion of Prospect Street immediately south of the alley. Plaintiff relied on the legal theories of acquiescence and adverse possession. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10) arguing that, pursuant to MCL 600.5821, plaintiff could not acquire title to a public street through adverse possession. Defendant also argued that the theory of acquiescence was inapplicable because that theory pertained to disputes between adjoining landowners regarding the location of the boundary between the properties. Defendant maintained that the theory of acquiescence was not applicable to plaintiff’s claim to property located on a platted public street.

The trial court denied defendant’s motion and allowed plaintiff to file a first amended complaint. In her first amended complaint, plaintiff alleged that she held title to the property between the paved portion of Prospect Street and Indian River pursuant to the legal theories of acquiescence, withdrawal of acceptance of the plat dedication, and adverse possession. Regarding the alley and the unpaved portion of Prospect Street immediately south of plaintiff’s property and the alley, plaintiff relied on the legal theory of abandonment and, alternatively, alleged that the portions of the street and alley were never properly dedicated or accepted as a public road or right-of-way.<sup>1</sup>

Defendant filed an amended motion for summary disposition relying on the same arguments that it previously asserted. Defendant also argued that a paved road within a platted right-of-way for many years constituted defendant’s acceptance of the dedication of a street or highway on the plat. Further, defendant contended that title to dedicated roads and alleys in plats does not revert to adjoining landowners if the government abandons such property. Thus, according to defendant, plaintiff could not acquire title to the property at issue under the theory of common-law abandonment.

The trial court decided defendant’s motion under MCR 2.116(C)(8) because defendant did not attach any documentary evidence in support of its motion. The court agreed with defendant’s arguments regarding acquiescence. Regarding adverse possession, the trial court determined that plaintiff “ha[d] stated a claim upon which relief [could] be granted provided facts and circumstances to support [that] adverse possession occurred prior to the enactment of MCL 600.5821.” The court further stated that it denied defendant’s motion for summary disposition with respect to plaintiff’s adverse possession claim “but only to the extent such claim relates to the period of time prior to the enactment of MCL 600.5821, and provided that there are facts and circumstances [] to support the same.” The court dismissed plaintiff’s remaining claims with prejudice.

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<sup>1</sup> Plaintiff also sought amendment or alteration of the original plat pursuant to the Land Division Act, MCL 560.101 *et seq.*, but she has not asserted any argument regarding that theory in this Court and has therefore abandoned that claim.

Thereafter, defendant filed another motion for summary disposition with respect to adverse possession. Defendant argued that the November 3, 1880, plat map of the Village of Indian River dedicated and conveyed to the public “to be used only as public highways” all the streets and alleys indicated on the map. Defendant contended that, pursuant to laws governing the creation of plats at the time that the plat in this case was recorded, a plat made and recorded conveys to the local unit of government fee title to land dedicated for public use for the purpose designated and for no other purpose. Thus, defendant argued, the dedication in the plat vested it with title to Prospect Street for use as a public highway. Defendant further argued that, pursuant to MCL 247.190, plaintiff could not have acquired title to any portion of Prospect Street by adverse possession.

In response, plaintiff argued that defendant abandoned the unpaved portions of Prospect Street and that title to an abandoned public highway reverts to the abutting landowners. The trial court agreed with defendant’s argument in its entirety and granted defendant’s motion.

## II. STANDARD OF REVIEW

We review de novo a trial court’s decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Because the trial court relied on documentary evidence when it granted defendant’s motion for summary disposition on plaintiff’s adverse possession claim, it appears that the court granted summary disposition on that claim under MCR 2.116(C)(10). The trial court granted summary disposition for defendant on plaintiff’s remaining claims pursuant to MCR 2.116(C)(8). In reviewing a motion brought under MCR 2.116(C)(10), this Court considers “the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party.” *Id.* “Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Id.* A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a plaintiff’s claim based on the pleadings alone to determine whether the plaintiff has set forth a claim on which relief may be granted. *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App 200, 206; 828 NW2d 459 (2012). “Summary disposition under subrule (C)(8) is appropriate if no factual development could justify the plaintiff’s claim for relief.” *Id.* (quotation marks and citation omitted).

Further, “[a]n action to quiet title is an equitable action that we also review de novo.” *Beach v Lima Twp*, 489 Mich 99, 106; 802 NW2d 1 (2011). Moreover, whether a plaintiff has riparian rights when her lot abuts a roadway that runs parallel to the shore and was dedicated under the plat act is a question of law, which this Court reviews de novo. *2000 Baum Family Trust*, 488 Mich at 143.

## III. PLAINTIFF’S CLAIM TO THE UNPAVED PORTIONS OF PROSPECT STREET, INCLUDING THE RIPARIAN PROPERTY

Plaintiff argues that she holds title to the unpaved portions of Prospect Street, including the property abutting Indian River, based on the alternative theories of acquiescence, adverse possession, and abandonment, and on our Supreme Court’s decision in *2000 Baum Family Trust*, 488 Mich 136. We will discuss each theory in turn.

## A. ACQUIESCENCE

A claim of acquiescence for the statutory period requires a showing that the parties acquiesced in a particular line and treated that line as the boundary for the statutory period, i.e., 15 years. MCL 600.5801(4); *Mason v City of Menominee*, 282 Mich App 525, 529; 766 NW2d 888 (2009). There need not be a bona fide controversy regarding the boundary, and possession need not be hostile or without permission. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

The law of acquiescence is concerned with a specific application of the statute of limitations to cases of adjoining property owners who are mistaken about where the line between their property is. Adjoining property owners may treat a boundary line, typically a fence, as the property line. If the boundary line is not the recorded property line, this results in one property owner possessing what is actually the other property owner's land. Regardless of the innocent nature of this mistake, the property owner whose land is being possessed by another would have a cause of action against the other property owner to recover possession of the land. After fifteen years, the period for bringing an action would expire. The result is that the property owner of record would no longer be able to enforce his title, and the other property owner would have title by virtue of his possession of the land. [*Kipka v Fountain*, 198 Mich App 435, 438-439; 499 NW2d 363 (1993).]

The trial court properly granted summary disposition for defendant on plaintiff's claim that she acquired the unpaved portions of Prospect Street, including the riparian property, by acquiescence. This case does not involve adjoining property owners or abutting lots. Rather, it involves plaintiff's lot and land dedicated and conveyed to the public for use as a public highway. The plat map recorded in 1880 states:

*Now therefore* in consideration of the premises the said *Floyd E. Martin* and *Anna Martin* his wife do hereby dedicate and convey to the public *Forever*, all the streets and alleys laid down in the annexed plat aforesaid, the same to be used only as public highways. [Emphasis in original.]

Prospect Street is in fact used as a public highway in accordance with the dedication. This case does not involve a boundary line separating plaintiff's lot and Prospect Street, which the parties agreed to treat as the actual boundary.

Plaintiff relies solely on *Mason*, 282 Mich App 525, in support of her claim that she acquired the property at issue by acquiescence. Plaintiff's reliance is misplaced because the facts in *Mason* are distinguishable from those in the instant case. In *Mason*, the plaintiffs owned residential property that was surrounded on three sides by Water Tower Park. At issue was a 60-foot strip of land that ran through Water Tower park and abutted the eastern border of the plaintiffs' property. The strip of land had been deeded to the defendant city for use as a street,

but the street was never improved or used as a roadway. Rather, the plaintiffs had used a portion of the strip of land as their driveway because their driveway extended onto the strip of land. *Id.* at 527. This Court held that MCL 600.5821(2)<sup>2</sup> did not shield the city from the plaintiffs' claim for possession of the property because that provision applied only to actions *brought by a municipality* to recover property. *Id.* at 527-529.

Unlike the instant case, *Mason* involved adjoining parcels of land, one being the plaintiffs' residential property and the other commonly known as Water Tower Park. The plaintiffs' driveway extended onto a portion of Water Tower Park, and the parties had treated a fence as the boundary line for the requisite 15-year period. *Id.* at 530. Despite that the specific portion of property at issue had originally been deeded to the defendant city for use as a street, that never occurred, and the property was never used as a roadway. Unlike *Mason*, the instant case involves land dedicated as a public highway and actually used as a public highway pursuant to the dedication. Accordingly, *Mason* is distinguishable from this case, and plaintiff's reliance on *Mason* is misplaced. The trial court did not err by granting summary disposition for defendant on plaintiff's acquiescence claim.

## B. ADVERSE POSSESSION

"An action to quiet title by adverse possession confers judicial recognition that the possessor acquired marketable title of record to the property at issue." *Beach*, 489 Mich at 102. The burden of establishing adverse possession lies with the party asserting the doctrine. *Id.* at 106 n 17. "To establish adverse possession, the party claiming it must show 'clear and cogent proof of possession that is actual, visible, open, notorious, exclusive, continuous and uninterrupted for the statutory period of 15 years, hostile and under cover of claim of right.'" *Id.* at 106, quoting *Burns v Foster*, 348 Mich 8, 14; 81 NW2d 386 (1957). "After the statutory period ends, the record owner's title is extinguished and the adverse possessor acquires 'legal title' to the property." *Id.* at 106-107 (footnote omitted).

Pursuant to MCL 247.190, a public highway that has been dedicated is not subject to adverse possession. That provision states:

All public highways for which the right of way has at any time been dedicated, given or purchased, shall be and remain a highway of the width so dedicated, given or purchased, and no encroachments by fences, buildings or otherwise which may have been made since the purchase, dedication or gift nor any encroachments which were within the limits of such right of way at the time of such purchase, dedication or gift, and no encroachments which may hereafter be made, shall give the party or parties, firm or corporation so encroaching, any title or right to the land so encroached upon.

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<sup>2</sup> MCL 600.5821(2) provides, "[a]ctions brought by any municipal corporations for the recovery of the possession of any public highway, street, alley, or any other public ground are not subject to the periods of limitations.

Thus, dedicated public highways are not subject to claims of adverse possession and shall remain highways “of the width so dedicated[.]” In *Sharkey v Petoskey*, 30 Mich App 640, 645; 186 NW2d 744 (1971), this Court relied on the statutory language in rejecting the plaintiffs’ claim that they obtained ownership by adverse possession of the portions of a road that had not been paved.

It is undisputed that Prospect Street was dedicated to the public for use as a public highway. As such, it is not subject to adverse possession. Moreover, it is immaterial that only a portion of Prospect Street was paved. *Id.* at 645. Pursuant to MCL 247.190, the highway shall remain a highway “of the width so dedicated[.]”

Plaintiff relies on *Beach*, 489 Mich 99, in support of her argument that she acquired the unpaved portions of Prospect Street, including the riparian property, by adverse possession. That case involved a disagreement between the plaintiffs and the defendant township regarding property rights to land designated as streets on the plat of Harford Village. *Id.* at 103. The plat was made and recorded in 1835. In 2004, the defendant purchased lots in the village with the intent to use and develop streets on the plat that had never previously been developed. *Id.* at 103-104. This Court upheld the trial court’s determination that the plaintiffs had established their adverse possession claim over areas of land platted as streets. *Beach v Lima Twp*, 283 Mich App 504, 521-524; 770 NW2d 386 (2009), *aff’d* 489 Mich 99. Key to this Court’s reasoning was the fact that the streets had been privately, rather than publicly, dedicated and that the defendant owned the privately dedicated streets “only by virtue of its ownership of lots in the subdivision.” *Id.* at 524. Plaintiff’s reliance on *Beach* is misplaced because the instant case involves a publicly dedicated street. Therefore, unlike in *Beach*, MCL 247.190 precludes plaintiff’s adverse possession claim. As such, the trial court properly granted summary disposition for defendant on that claim.

### C. ABANDONMENT

Plaintiff next argues that she acquired the property at issue under the common-law theory of abandonment by nonuse.<sup>3</sup> “To prove such abandonment, both an intent to relinquish the property and external acts putting that intention into effect must be shown by the party asserting abandonment.” *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003). In cases in which the land at issue was dedicated to public use by a plat, the party asserting abandonment must also show that “the use for which the subject property was dedicated ‘wholly fails.’” *Id.* at 652 n 15; see also *Elias Bros, Inc v Hazel Park*, 1 Mich App 30, 35; 133 NW2d 206 (1965).

In this case, plaintiff has made no showing that defendant intended to relinquish the area platted as Prospect Street, let alone presented evidence of any external acts putting that intention into effect. Moreover, plaintiff has not shown that the use for which the area platted as Prospect Street has wholly failed. To the contrary, it is undisputed that the area is used as a public

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<sup>3</sup> Plaintiff does not argue that defendant abandoned Prospect Street pursuant to the statutory procedure set forth in MCL 224.18.

highway as dedicated and that a portion of the roadway was paved. Notably, it is not necessary that every portion of the area platted as Prospect Street be used for public travel. In *Elias Bros, Inc*, 1 Mich App at 33, the plaintiffs claimed that they acquired an easement by prescription in dedicated property that was platted for public use, but was not actually used for that purpose. This Court rejected the plaintiffs' argument and recognized that "[i]t is not essential that every part of a highway in length or width should be worked, improved, or travelled, in order to show the intent of the public to accept a dedication." *Id.* at 34 (citation omitted). Accordingly, plaintiff's argument that she acquired the unpaved portions of Prospect Street, including the riparian property, by abandonment lacks merit, and the trial court properly granted summary disposition for defendant on that claim.

#### D. 2000 BAUM FAMILY TRUST

Plaintiff also argues that our Supreme Court's decision in *2000 Baum Family Trust*, 488 Mich 136, supports her claims. That case involved whether the plaintiffs, front-lot owners in a platted subdivision on the northern shore of Lake Charlevoix, enjoyed riparian rights. As in the instant case, the plaintiffs' lots were separated from the lake by a roadway that abutted the shoreline. *Id.* at 140. Over the years, the plaintiffs had used the lakefront property and maintained docks extending into the water to moor boats. *Id.* at 141. Our Supreme Court held that the plaintiffs had riparian rights "as similarly situated persons have *always* had in this state." *Id.* at 186 (emphasis in original).

We decline to address plaintiff's argument that she enjoys riparian rights pursuant to *2000 Baum Family Trust*. Plaintiff did not raise that argument in the trial court, and, as such, the trial court did not address it. It is therefore not preserved for our review. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005) ("Generally, an issue is not properly preserved if it is not raised before, and addressed and decided by, the trial court.") Because a decision on that issue is necessary for a proper determination of this case, however, we remand this case to the trial court for the court to determine whether plaintiff has riparian rights pursuant to *2000 Baum Family Trust*. We note that *2000 Baum Family Trust* involves riparian rights only and is inapplicable to plaintiff's claim regarding the non-riparian, unpaved portions of Prospect Street. As discussed above, plaintiff's claims to those portions of Prospect Street lack merit, and the trial court properly granted summary disposition in favor of defendant on those claims.<sup>4</sup>

#### IV. PLAINTIFF'S CLAIM TO THE ALLEY

Plaintiff next argues that she holds title to the alley adjacent to her home because defendant never accepted the dedication of the alley in the plat or maintained the alley. "[A]

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<sup>4</sup> Further, plaintiff's reliance on *Cheboygan Co Rd Comm v Smyth*, unpublished opinion per curiam of the Court of Appeals, issued May 29, 2003 (Docket No. 236827), is misplaced. First, that opinion is unpublished and has no precedential value. MCR 7.215(C)(1). Second, that case involved the establishment of a road under the highway-by-user statute, MCL 221.20, and is inapposite to the issues presented in this appeal.

valid dedication of land for a public purpose requires two elements: a recorded plat designating the areas for public use, evidencing a clear intent by the plat proprietor to dedicate those areas to public use, and acceptance by the proper public authority.” *Kraus v Dep’t of Commerce*, 451 Mich 420, 424; 547 NW2d 870 (1996). “Public acceptance must be timely, and must be disclosed through a manifest act by the public authority either formally confirming or accepting the dedication, and ordering the opening of such street, or by exercising authority over it, in some of the ordinary ways of improvement or regulation.” *Id.* (quotation marks and citations omitted).

In her first amended complaint, plaintiff alleged that she held exclusive fee title to the alley based on the theory that it was “never properly dedicated, or accepted, as a public road or right-of-way.” Thus, plaintiff alleged, neither defendant nor the public at large had any interest in the alley. In its motions for summary disposition, defendant failed to address plaintiff’s claim that the alley was never properly accepted. Accordingly, the trial court never addressed that claim. We decline to review plaintiff’s argument pertaining to the alley because it is not properly preserved for our review. See *Hines*, 265 Mich App at 443. We therefore direct the trial court on remand to address plaintiff’s claim that she holds fee title to the alley because defendant never accepted the dedication of the alley.

## V. JURY DEMAND

Finally, plaintiff argues that the trial court erred by striking her jury demand because she is entitled to have factual issues determined by a jury. At the time that defendant filed its objection to plaintiff’s jury demand and its motion to strike plaintiff’s jury demand, the trial court had already dismissed all of plaintiff’s claims with the exception of her adverse possession claim. As noted above, however, plaintiff did not raise in the trial court her argument that she has riparian rights pursuant to *2000 Baum Family Trust*, and the trial court therefore did not address that issue. The trial court also did not address plaintiff’s claim that she holds fee title to the alley because defendant never accepted the dedication of the alley. Ultimately, the trial court granted defendant’s motion, stating “[i]ssues of title including claims of adverse possession are equitable matters and the Plaintiff is not entitled to a trial by jury.”

For the purpose of the limited issues presented on remand, we hold that plaintiff is not entitled to a trial by jury. There is no right to a jury trial in an equitable action. *Draggo v Draggo*, 223 Mich App 415, 427; 566 NW2d 642 (1997). It is undisputed that actions to quiet title are equitable actions. MCL 600.2932(5); *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004). Moreover, plaintiff explicitly stated in her first amended complaint that she “is not requesting an award of damages from Defendant.” (Emphasis in original.) Accordingly, plaintiff is not entitled to a jury trial on remand.

## VI. CONCLUSION

In summary, we affirm the trial court’s orders granting summary disposition to defendant with respect to plaintiff’s claims to the unpaved portions of Prospect Street, including the riparian property, based on the theories of acquiescence, adverse possession, and abandonment. We remand this case to the trial court for the court to address plaintiff’s argument that she enjoys riparian rights pursuant to *2000 Baum Family Trust*. We also direct the trial court to address



plaintiff's claim that she holds fee title to the alley because defendant never accepted the dedication of the alley. Finally, on remand, plaintiff is not entitled to a jury trial because the issues to be addressed are equitable in nature.

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs are taxable pursuant to MCR 7.219, neither party having prevailed in full.

/s/ David H. Sawyer

/s/ Patrick M. Meter

/s/ Pat M. Donofrio